Supreme Court of Errors of Connecticut.

THE COMPANY FOR ERECTING AND SUPPORTING A TOLL-BRIDGE FROM NEW HAVEN TO EAST HAVEN *vs.* WALTER OSBORN.[1]

It is the general policy of the law to avoid double taxation, and this consideration is of weight in determining the construction of statutes imposing it; but where their meaning is clear the courts cannot hold such taxation illegal.

A corporation was chartered in 1796 to build and maintain a toll-bridge, with power, "for the purpose of carrying the resolve into effect," to purchase and hold lands not exceeding one hundred acres. The company built the bridge, and soon after purchased a large quantity of mud flats, adjoining the bridge, and erected wharves upon a portion of it, which became of great value and were profitably rented. An act passed in 1847 provided that the real estate of any private corporation, "above what was required and used for the transaction of its appropriate business," should be liable to be assessed and taxed to the same extent as if owned by an individual. Held, that the real estate thus used by the company for wharves was liable to taxation under the statute.

Such a use of the real estate which the company was authorized to purchase and hold was not contemplated or authorized by its charter.

And the question as to what rights the company might have acquired by prescription did not properly arise, inasmuch as the charter, on which the company itself relied, showed clearly what was its appropriate business, and this was the sole question in determining the liability of the property to taxation.

The charter provided that the bridge and all property owned by the company appurtenant thereto, should be considered personal estate and divided into shares. Held, that this provision related to the property of the stockholders as represented by the shares, and not to the property of the corporation itself in its relation to other parties, and that the property in question was therefore taxable as real estate.

ASSUMPSIT, brought to the Superior Court in New Haven County against the defendant, as tax collector, to recover the amount of certain taxes collected of the plaintiffs upon warrants held by him. The facts, which were found by an auditor, were as follows:

The plaintiffs are a corporation under a charter granted in 1796, authorizing the company to build a bridge and collect tolls for the period of seventy years (subsequently extended to

[1] We are indebted for this case to the courtesy of Mr. Hooker, the reporter.—ED. A. L. R.

one hundred and fifty), and for that purpose to purchase and hold lands not exceeding one hundred acres.

Under this authority the company had purchased, in 1797 and 1816, a large quantity of mud flats, adjoining the abutments of the bridge, which had subsequently been filled in and covered with wharves, from the rent of which a large part of the company's income was derived.

By an Act of 1847 (Gen. Statutes, p. 712, sec. 23), "the real estate belonging to any bank, national banking association, insurance company, or other private corporation, over and above what may be required and used by such bank, insurance company, or other private corporation, for the transaction of its appropriate business, shall be liable to be assessed and set in the list of such corporation in the town where such real estate is situated, and shall be liable to taxation to the same extent as if owned by an individual."

Under this act a tax was laid by the assessors of New Haven, in 1865, upon all the property not actually used in connection with the bridge, and collected by the defendant. This was an action to recover back the amount so levied and collected.

On these facts the case was reserved for the advice of this court.

Watrous, for the plaintiffs.

1. These wharves are already taxed *three* times. It is against the policy of our law to tax any property twice, much more to tax it four times, and courts of justice will not allow such unjust taxation unless clearly compelled so to do by the sovereign power of the legislature. *New Haven* v. *City Bank*, 31 Conn., 114; Ang. & Ames on Corp., §§ 460, 461.

2. Building and using these wharves is a part of the "appropriate business" of the plaintiffs. 1st. They are by their charter expressly authorized "to purchase and hold lands not exceeding one hundred acres, *appurtenant* to said bridge, for the purpose of carrying this resolve into effect." The resolve gives the power to *build* and imposes the duty to *keep in repair* a bridge. These appurtenant lands were of no value till filled in and improved by the plaintiffs. How, then, were they to aid the purpose of the resolve? The legislature must, therefore,

have contemplated the improvement and *use* of these lands by the company. And *what* use, if not the most natural, feasible and practicable use? 2d. The legislature empowered the plaintiffs to occupy, for their corporate business, lands on which, for more than fifty years, a ferry and *wharves* had been maintained when the charter was granted. It could not have contemplated the *abandonment* of those wharves, when it authorized the building of a bridge in place of the ferry, and the purchase of a hundred acres of land appurtenant to the bridge. 3d. If it can be supposed that the legislature did not have in view this particular "use" of these lands, still the law would infer that they could be put to a *reasonable, appropriate and profitable use.* The powers and rights expressly granted would fail without such an implication: 2 Redf. on Railways, sec. 231; Pierce on Railways, 9, 14, 54; *New Haven* v. *City Bank,* 31 Conn., 110. See also *Moss* v. *Averell,* 10 N. York, 449, 454; *Schenectady and Syracuse Plank Road Company* v. *Thatcher,* 11 id., 102; *Durfee* v. *Old Colony R. R. Co.,* 5 Allen, 530.

3. The charter has, by immemorial usage, received a construction which neither the state nor any citizen of it ought to be at liberty to dispute: *Mayor of Hull* v. *Horner,* Cowp., 102; *Withnell* v. *Gartham,* 6 T. R., 388, 398; *Davidson* v. *Fowler,* 1 Root, 358; *Episcopal Church* v. *Newbern Academy,* 2 Hawks, 233; 2 Redfield on Railways, sec. 233 *c,* § 3.

4. The plaintiffs have by *prescription* a right to maintain and use these wharves. 1st. The *creation* of a corporation by act of the sovereign power will be presumed after the lapse of much less time than the plaintiffs have owned and used these wharves: *Johnson* v. *Ireland,* 11 East, 280; *Read* v. *Brookman,* 3 T. R., 158; Ang. & Ames on Corp., § 70; 1 Redfield on Railways, sec. 17 *a; Green* v. *Chelsea,* 24 Pick., 71; *Avery* v. *Stewart,* 1 Cush., 496; *Shrewsbury* v. *Brown,* 25 Verm., 197; *Thorpe* v. *Rutland and Burlington R. R. Co.,* 27 id., 140; *Hart* v. *Chalker,* 5 Conn., 311, 315. 2d. Prescription runs in favor of a corporation in the same way as in favor of an individual: cases above cited; also *Greene* v. *Dennis,* 6 Conn., 292, 296, 302. 3d. A *fortiori* will the grant of a particular corporate

function or franchise be presumed from lapse of time: *Mayor of Hull* v. *Horner*, Cowp., 102; *Bank of United States* v. *Dandridge*, 12 Wheat., 70. 4th. The right to build and use a wharf is a "franchise," and a grant of the same will be presumed: 2 Washburn Real Prop., 78; *Gray* v. *Bartlett*, 20 Pick., 186; *Wiswall* v. *Hall*, 3 Paige, 313, 318. 5th. If the building and using of these wharves is not the "appropriate business" of the plaintiffs, then they are acts *ultra vires*, and the plaintiffs are, and for seventy years have been, *mere usurpers*, and *Quo Warranto* would lie for the usurpation: Ang. & Ames on Corp., § 737. But such a proposition would be simply absurd: Ang. & Ames on Corp., § 743; *Winchelsea Causes*, 4 Burr., 1962.

5. These wharves are personal estate. The charter provides that "said bridge and all property appurtenant thereto, and vested in and belonging to said company, shall be considered and is declared to be personal estate." Not the "stock," as in many charters since 1797, but the *property* is declared to be "personal estate."

C. R. Ingersoll for defendant.

Opinion of the court by

HINMAN, C. J. The question is, whether the property assessed was liable to taxation under the plaintiffs' charter, as real estate, under the 23d section of the statute passed in 1847, relating to the assessment of taxes, Gen. Statutes, page 712.

The first two claims of the plaintiffs are so nearly identical, that they may properly be considered together. They are in substance, that the tax in this case is grossly inequitable and unjust, because if sustained it amounts to double taxation; or, as is claimed in this case to be the fact, the property under the statutes as construed by the defendant, is taxed three or four times. This is said to be so, because the market value of the stock of the plaintiffs is to a great extent dependent upon the value of these wharves; and as the bulk of the stock is owned by the Hartford and New Haven Railroad Company, the value of the wharves enhances the value of the company's stock; and as a state tax is laid upon the value of this railroad stock, and and as the stock is also taxed as the private property of its

individual owners, it is therefore burdened with some three or four distinct and separate taxes. We have not deemed it important to enquire into the fact as to whether this property is subjected in some form to other taxation than such as is imposed by the statute under which the taxes in question were collected, because, as remarked by ELLSWORTH, J., in the case of the *Savings Bank* v. *The Town of New London*, 20 Conn. 117, "taxation at best is unequal and arbitrary, and under the present law is double in the case of banks, whose real estate (not used for a banking house) is taxed, while their stock is taxed to individuals who own it." And it may be added that the instances in which property is taxed more than once, are not very infrequent. Formerly it was the case in respect to that large amount of indebtedness secured by mortgage, where the debt was liable to taxation against the creditor, and the property by which the debt was secured was also taxed against the mortgagor. No doubt it is and ought to be the general policy of the legislature to avoid double taxation of the same property. But there is also as little doubt that this general policy is not always carried out. And while it may be true that in a case of doubtful construction as to the meaning of the legislature, this policy might be sufficient to authorize the court to give a construction to a statute that would avoid this result, still, in cases where the language is clear, the fact that it imposes double taxation will never justify a court in disregarding it.

Again, it is claimed that the legislature granted to the plaintiffs by their charter, power to purchase a large quantity of land, in pursuance of which the plaintiffs did purchase a strip of mud flats on each side of the river, much larger than was necessary for the mere purposes of the bridge; that it must have been purchased for the purpose of constructing wharves upon it; that the plaintiffs very soon commenced constructing wharves upon these flats; that the legislature has since repeatedly had the charter of the company under consideration, and has made alterations in it, yet in no instance was the known use the plaintiffs were making of the property complained of; and it is claimed that thus a construction has been put upon

the charter which cannot now be disputed, or at least that the right has been acquired to so use this property; and that it thus becomes a part of the appropriate business of the company to own and rent wharves, and that so, under the language of the statute, the property can only be taxed as a part of the capital of the company. We do not assent to this proposition. On the contrary, we think the only appropriate business of the plaintiffs was the erection and maintenance of a toll bridge. As incident to this business, they would need land on which to erect its structure with its abutments and piers, and large quantities of dirt and gravel would also be required for the purposes of grading and filling in, and in view of this necessity the company was authorized to purchase and hold not exceeding one hundred acres of land. But the legislature never intended that the authority to purchase and hold lands should be made use of as an authority to build and rent wharves, any more than it intended to authorize the building and renting of stores or houses, or the business of farming, whatever might have been the object of the applicants themselves in procuring the charter with these provisions to be granted. And where there are no words in the grant, as we think there are none in this company's charter, to justify the building of wharves for the mere purpose of deriving an income from the renting of them, the long continued practice of the company in pursuing the business cannot authorize us to imply such a power.

Again, it is claimed that the plaintiffs have by prescription acquired the right to maintain and use the wharves and docks in question. The question in this case is not as to whether such a corporation as the plaintiffs exists. Here the existence of the corporation is claimed by the plaintiffs, and not denied by the defendant. The charter of the company is shown and relied upon as evidence of the power to hold and maintain these wharves as a part of the appropriate business of the company under it. There is, therefore, no room for prescription as to what is the appropriate business of the company, as it affects the right of the public to tax its property. That must depend upon the charter. The plaintiffs show their grant and profess to be acting under it, and at the same time are

claiming power to do acts which are not authorized by it. These claims are repugnant to each other, and cannot be sustained.

The remaining claim of the plaintiffs is, that these wharves and docks are personal property, because, as is claimed, the charter makes them so. The charter provides that the "bridge and all property appurtenant thereto, and vested in and belonging to said company, shall be considered, and is hereby declared to be personal estate." But the town of New Haven has not attempted to tax the plaintiffs' bridge, and it claims that the property which it has taxed, is in no sense appurtenant to it, and, therefore, not within the language of the clause of the charter. Of course the property must, under the statute under which the tax was laid, be "real estate over and above what was required and used" in the appropriate business of the corporation. And if such is the fact in regard to this property, then it is difficult to see how it can be any part of the bridge, or be appurtenant to it. The property itself, therefore, does not come within that provision of the charter, making certain of its property personal estate, unless it is appurtenant to the bridge structure itself, and this is hardly claimed to be the case in respect to that portion of it that is found to be at a distance of five hundred feet from the structure. And if any part of the wharves and docks can properly be said to be appurtenant to the bridge, it can, we think, only be so said in respect to the two small wharves with which the bridge was provided when first erected. And how it might be in regard to these, we have no occasion to determine at this time, as we are not aware that they are included in or constitute a part of the property on which the tax was laid, and the plaintiffs make no separate or distinct claim in respect to them.

Again, we do not think that the provision in the plaintiffs' charter, in respect to the bridge and the property appurtenant to it, declaring that it shall be considered to be personal estate, was intended to change the character of the estate, so as to make the real estate that the company purchased under its power to do so, personal estate the moment the company became its owners. At the time the charter was granted, it

was probably supposed that the shares in such a corporation might be considered real estate, unless some provision of this sort was inserted in the charter, as was afterwards held to be the case in respect to the shares in a turnpike company in the case of *Welles* v. *Cowles*, 2 Conn. 567; and to guard against this result this provision was, we have no doubt, inserted in the charter. We assent, therefore, to the claim of the defendant's counsel upon this point, that the property that by the charter was declared to be personal estate, was simply that which was to be divided into and represented by shares of stock. The object was to facilitate the transaction of the business of the corporation, and enable the stock to be transferred by the individual holders of it, without the inconvenient formality of making deeds of it as if it were real estate; as remarked by Chancellor WALWORTH, in *The Mohawk & Hudson Railroad Co.* v. *Clute*, 4 Paige 393, in speaking of a provision declaring the stock of a company personal property, "it merely relates to the nature or character of the property which the stockholders are to be deemed to have in the several shares of of the stock of the company as individuals, and not to the character of the property held by the company in its corporate capacity for the benefit of such stockholders." We cannot think, therefore, that the legislature by one clause of this charter, intended to authorize this company to purchase and to hold real estate not exceeding one hundred acres, and intended at the same time by another clause, to turn this real estate into personal property as between the company itself and third persons. But by the construction which we give to the charter, there is no conflict whatever between these two provisions.

Upon the whole case, therefore, we have come to the conclusion that the wharves and docks were and are real estate, not used by the plaintiffs in the appropriate business which the charter authorized; and that they were therefore liable to taxation by the Town and City of New Haven. We therefore advise the superior court that the defendant is entitled to judgment.

In this opinion the other judges concurred.

The foregoing case is one of considerable practical interest both to taxpayers and the profession, although not one which at the present day can fairly be regarded as involving a question of any serious doubt.

The greatest possible confusion would result if we should attempt to fix any plan whereby no property should be subjected to more than one taxation. And yet this seems to be the ideal of the general public on that subject. All income taxes violate this dogma many times over, in every state and district where they are carried out. The same is true of almost all taxes not imposed upon specific property. But it seems high time to ignore any such pretension in regard to taxation, when we are all taxed to the utmost limit of endurance, without the slightest regard to the singleness or oneness of the imposition.

But in regard to the taxation of corporations, there are so many modes of imposing it, both upon the company and the shareholder, that there is unquestionably great danger of abuse, within strictly legal limits. In the first place, the corporation is liable to taxation upon all its capital stock or property owned by the corporation, and at the same time owners of the shares may be and commonly are taxed upon them, thus, in effect, taxing the same property twice to the same persons, once in bulk and once in shares. But there can be no possible legal objection to this double taxation, since the one is imposed upon the corporation, which is in law and in fact as distinct in its personality and existence from the corporation, as any one natural person is distinct from another.

And when the corporation, in addition to their ordinary capital stock, own property, real or personal, which is not embraced in or represented by the capital stock, there is no reason why it may not also be subjected to a separate taxation. This is the ordinary case of banking corporations, owning or holding a banking house, forming no portion of the capital stock.

And there are many instances where corporations have been taxed specifically for separate property, as the road-bed and superstructure of a railway, which was embodied in the capital stock, for which a separate tax was also paid; and we are not aware that any legal impediment exists to one form of the taxation on account of the imposition of the other. We have discussed these questions somewhat in The Supplement to the Law of Railways, pp. 496–516, where the cases are referred to. They will be found very carefully collected in the briefs in the present case. See also 2 Redf. Railw., pp. 377–388; 390–405; and numerous cases cited.

I. F. R.